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IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1939

NO. 68

WILLIAM HELIS, *Petitioner,*

v.

MRS. ITASCA KINNEY WARD, *as Executrix of the Estate of
Bryan Ward, deceased, et al., Respondents*

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

MAY IT PLEASE THE COURT:

I.

Statement of the Case

Believing that petitioner's statement of the case in his brief is incomplete in several material respects, respondents prefer to make a separate statement.

On February 6, 1935, Iberia Oil Corporation and respondent Y. D. Spell entered into a written option contract with petitioner William Helis, whereby they agreed, if he exercised the option given therein, to assign to him all their rights in and under an oil and gas lease covering 60 acres of land in the Little Bayou Oil Field in Iberia Parish, Louisiana (R. 26-37). Iberia Oil Corporation thereafter was dissolved; and all of its rights under said contract passed to its stockholders, Bryan Ward and respondents A. L. Mitchell and A. B. Mhoon (R. 136-144). Bryan Ward died while this suit was pending in the District Court, and respondent Mrs. Itasca Kinney Ward, his widow and executrix, was substituted as a party (R. 83-85). Hereinafter, respondents will be referred to as though they were the original parties to said contract.

At the time the option contract was made respondents had drilled on the land one producing oil well (called the Bernard No. 1) and were then engaged in drilling a second well (called the Bernard No. 2), which they agreed to drill to completion. As consideration for the option to purchase, petitioner obligated himself to commence the drilling of a third well (called the Bernard No. 3) within 15 days from the date of the contract and at his own expense to drill the well to completion (R. 27). Paragraph 3 of the contract provided that if petitioner elected to purchase the lease, the purchase price should be determined as follows (R. 28):

"(a) In the event the Bernard No. 2 well or the Bernard well No. 3 well should be brought in as producers the purchase price of the leasehold interest shall be \$300,000.00 if the average daily production of said wells for a period of fifteen days after completion is less than 3000 barrels each, calculated on a $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the capacity of the oil wells.

"(b) In the event either the Bernard No. 2 or the

Bernard No. 3 well should be brought in capable of production [producing] more than 3000 barrels per day, calculated as above-set forth, then the purchase price shall be \$400,000.00.

"The purchase prices above set forth shall be paid, fifty per cent in cash as provided herein, and fifty per cent out of $\frac{1}{4}$ th of $\frac{7}{8}$ ths of the proceeds derived from the production from all wells drilled and hereafter drilled on the said property."

By a paragraph incorporated into the contract as a signed addendum clause the parties stated (R. 37):

"It is agreed by the undersigned that the test provided for in paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or wells, Judge Harden of the firm of Pujo, Harden & Bell, will appoint a reputable engineer to act as umpire."

Petitioner agreed to exercise his option to purchase within two days after the expiration of the 15-day test period provided in paragraph 3 (R. 29), and in that event he agreed to pay to respondents as additional consideration the cost of completing the Bernard No. 2 well whether it was a producer or not. It was agreed that upon exercise by petitioner of the option, respondents would execute to him an assignment of the lease on the form attached to the contract and deliver the assignment to the National Bank of Commerce in New Orleans (hereinafter called "the bank") for his attention; and petitioner agreed to accept the assignment and pay "the proper cash portion of the purchase price" within three days after he "shall have been notified in writing of the delivery of said assignment to the said bank" (R. 29-30). It

was further agreed that if respondents failed to deliver the assignment petitioner should have the right to deposit in the bank "the applicable cash portion of the purchase price and this instrument thereafter shall stand in lieu of the aforesaid assignment," and petitioner "shall thereafter own and hold possession of the leasehold estate in the same manner as if the said assignment had been executed" (R. 30).

The Bernard No. 2 well was dry (R. 96, 110), and the Bernard No. 3 well was completed as a very large producer of oil on April 21, 1935 (R. 110). From that date to February 26, 1937, when this case was tried in the District Court, 2,000,000 barrels of oil, or more, was produced from the lease and sold by petitioner for prices ranging from \$0.90 to \$1.04 per barrel (R. 95-96, 109-110, 163-164).

By letter dated April 24, 1935, respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the Bernard No. 3 well was capable of producing much in excess of 3000 barrels of oil per day; but if petitioner was not satisfied of that fact, respondents were ready to appoint a representative to make a test as provided in the option contract (R. 144-145):

After an exchange of telegrams between the parties on April 25, 1935 (R. 146-147, 177-178), it became evident that a test would have to be made; and on April 26th (R. 148, 178-179), respondents designated E. O. Buck as their representative to make a test and the parties agreed to have the test made on the following day (R. 148). Buck went to the lease next day to make the test, but Smith and Brashear, petitioner's representatives, refused to actively cooperate; and Buck then made tests alone and reported that the well was capable of producing in excess of 6000 barrels per day (R. 149-150, 204-208), but would not produce 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke. The parties still being

unable to agree, Judge C. F. Hardin, as provided by the addendum clause of said contract (R. 37), appointed W. L. Massey to act as umpire in making a new test (R. 153-154, 180); but petitioner, though first agreeing to the appointment (R. 152-153), later objected (R. 181-195). Nevertheless, Massey made the test on May 4th in conjunction with Buck, respondents' representative, and one Smith, representing petitioner; and he found that the well would not produce 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke but was capable of producing "much in excess of 3000 barrels per day on an open flow" (R. 208-214). Buck concurred in Massey's findings and conclusions and adopted Massey's report of the test as his own (R. 210).

Thus was issue joined in the controversy which precipitated this lawsuit. Both parties conceded that the Bernard No. 3 well was incapable of producing 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke, but the petroleum engineers reported that it was "capable of producing more than 3000 barrels per day" on open flow. Respondents contended that since the well was "capable of producing more than 3000 barrels per day" on open flow, calculated on a $\frac{3}{8}$ -inch choke, the purchase price for the lease was \$400,000 under a proper interpretation of the contract. On the other hand, petitioner contended that the purchase price was not to be \$400,000 unless the well could produce more than 3000 barrels per day *through* a $\frac{3}{8}$ -inch choke, and since all parties conceded that the well was incapable of such production, the proper purchase price was \$300,000.00. The basis of the disagreement between the parties was one of interpretation of the option contract: *whether, under the terms of the contract, productive capacity of the well was to be measured (1) by the amount of oil per day it could produce "through" a $\frac{3}{8}$ -inch choke or (2) by the amount of oil it could produce on open flow "calculated on a $\frac{3}{8}$ -inch choke."*

After some correspondence between the parties (R. 155-161, 195-198) respondents, on May 11, 1935, executed, on the form attached to the original option contract, an assignment to petitioner of the lease (R. 136-139). The assignment recited a consideration of \$400,000, one half thereof in cash and the remaining one half thereof out of one fourth of seven eighths of the oil produced from the lease; *and respondents, by the terms of the assignment, expressly reserved one fourth of seven eighths of the oil produced from the land until they were paid by petitioner the sum of \$200,000.00 from the proceeds of such oil.* The assignment was attached to two drafts drawn on petitioner for the \$200,000.00 cash portion of the consideration, respondents' cost of completing the Bernard No. 2 well, and the value of certain oil in storage on the lease; and the drafts and assignment were forwarded to the National Bank of Commerce in New Orleans, as provided by the contract (R. 166-167). The drafts were paid by petitioner on May 14th (R. 166-167) *and the assignment was delivered to him and filed for record in Iberia Parish on May 15th* (R. 139). Ten minutes after he paid the drafts a writ of garnishment was served on the bank (R. 44-45).

Petitioner, a citizen of Louisiana, had filed suit against respondents, citizens of Texas, in the Civil District Court of Orleans Parish either prior to or immediately after he paid the drafts, and the writ of garnishment was issued out of that suit (R. 2-40). By his suit petitioner sought recovery of that portion of the amount paid to the bank which was in excess of the \$150,000 which he contended was due to respondents. Upon petition of respondents the case was properly removed to the United States District Court for the Eastern District of Louisiana (R. 47-61). After removal, respondents filed their answer and cross-action praying for recovery of the unpaid balance of the purchase price of \$400,000 and in the

alternative for rescission and cancellation of the contract and assignment (R. 61-68). Thereafter *petitioner voluntarily dismissed his suit* (R. 74), and filed his reply to respondents' cross-bill (R. 75-82). The suit was tried on February 26, 1937, and by opinion filed September 3, 1937 (R. 85-93) and decree signed September 27, 1937, the District Court denied respondents any relief and dismissed their cross-bill (R. 94). The opinion of the District Court is reported in 20 F. Supp. 14. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause with directions to enter judgment for respondents for \$100,000.00, with legal interest (R. 238, 243). The opinion of the Circuit Court of Appeals is reported in 102 F. (2d) 519.

II.

ARGUMENT

Summary of the Argument

POINT A: The Circuit Court of Appeals found as a fact that petitioner was bound by the tests made by two competent petroleum engineers who were properly designated, under the express terms of the contract, to determine, among other facts, the amount of oil the Bernard No. 3 well was capable of producing on open flow; and since the reports of such tests were properly in evidence and disclosed that such well was capable of producing much in excess of 3000 barrels per day on open flow, that fact is binding upon petitioner and no purpose would be served by remanding the case for a new trial on that issue.

POINT B: The undisputed evidence discloses that petitioner, with full knowledge of the controversy then existing between the parties over the proper purchase price of the lease, ac-

cepted from respondents and promptly filed for record an assignment reserving to respondents an oil payment of \$200,-000.00, and that he now holds and claims title to the lease under and by virtue of that assignment. Consequently, petitioner is estopped as a matter of law to deny his obligation to pay respondents the consideration recited in said assignment; and the judgment of the Circuit Court of Appeals, awarding respondents the unpaid portion of said oil payment, was the only judgment that properly could have been rendered under the facts, and should be affirmed.

Point A

The Circuit Court of Appeals found (R. 231) that E. O. Buck and W. L. Massey, petroleum engineers, made their tests of the Bernard No. 34 well strictly in accordance with the provisions of paragraph 3 and the addendum paragraph of the contract, that the tests were fairly, thoroughly and competently made, and (R. 235) that *petitioner is "bound by the tests made by the petroleum engineers."*

Both Buck (R. 149-150, 208-210) and Massey (R. 208-210), after the tests were made, reported that the well would not produce 3000 barrels of oil per day *through a 3/8-inch choke but would produce "far in excess of 3000 barrels of oil per day on open flow."*

In view of the finding of the Circuit Court of Appeals that petitioner is "bound by the tests made by the petroleum engineers," the reports giving the results of such tests must, if properly in evidence, be accepted as conclusive of the facts and opinions expressed therein. That such reports *were* properly in evidence appears affirmatively from the record. In petitioner's original petition by which this suit was instituted he admitted that Buck (R. 6) and Massey (R. 8) had made tests of the well, and their joint report was attached as an

exhibit to the petition (R. 208-214). Also attached as an exhibit was a letter from Buck to Wm. N. Bonner, attorney for respondents, detailing the results of his first test (R. 204-208). In his brief here (pp. 13-14) petitioner says: "Neither of these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading." That statement is erroneous. A copy of Buck's first report, addressed to all interested parties, *was offered in evidence by respondents and admitted without objection* (R. 149-150; see, also, the comment of the District Court, R. 108).

In its opinion the District Court considered the reports as part of the evidence in the case. In the Circuit Court of Appeals, petitioner conceded that the tests were made and admitted the substance of the reports. In his brief in that court, he said (pp. 4-5):

"On April 29, 1935, Buck rendered a report based on his observation of the well on two different days and on various chokes ranging in size up to $\frac{1}{2}$ inch, his conclusions being that the well was incapable of producing 3000 barrels per day on a $\frac{3}{8}$ inch choke, but that it would produce in excess of 3000 barrels per day on any choke as large as a $\frac{5}{8}$ inch choke (Tr. pages 149, 204-208).

"Over the protests of Helis, (Tr. page 181) W. A. Massey, a petroleum engineer was designated as an umpire pursuant to the rider to the contract of February 6, 1935, set forth above (Tr. pages 153, 154, 180). Massey, in company with Buck, conducted a test and on May 6, 1935, reported that observations on chokes varying in size from $\frac{1}{4}$ inch to $\frac{5}{8}$ inch caused him to conclude that the well was capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow or through any choke larger than a $\frac{5}{8}$ inch choke. (Tr. pages 208-214). He further found, pursuant to his instructions from Judge Hardin to find

the producing capacity of the well on a $\frac{3}{8}$ inch choke that: 'the well will not make 3000 barrels per day on such $\frac{3}{8}$ choke' (Tr. page 209).

"The report of Mr. Massey was concurred in by Mr. Buck (Tr. page 210)."

In his petition for rehearing in that court, he referred to the reports time and again (pp. 4, 8-9, 24-35, 30). He said (p. 8):

"The report of Mr. Buck (Tr. p. 204) discloses that he operated the well on a $\frac{1}{8}$ " choke, a $\frac{1}{4}$ " choke, a $\frac{3}{8}$ " choke and a $\frac{1}{2}$ " choke; he ascertained the production and pressure obtained with each choke; and upon the basis of all the figures thus obtained reported:

"The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a $\frac{3}{8}$ " choke."

It is apparent, therefore, that until he filed his petition for certiorari, petitioner had never contended in either of the courts below that the reports of the petroleum engineers were not properly in evidence. On the other hand, he had uniformly considered that the reports *were* in evidence, and upon the facts set forth therein he had argued in the Circuit Court of Appeals for affirmance of the judgment of the District Court.

It is a familiar principle that "a party having admitted or assumed the existence of certain facts in the lower court, he is estopped to controvert the existence of such facts when the case is heard on appeal." (19 Am. Jur. 723; 8 Am. & Eng. Ann. Cas. where the cases are collated). A clearer case than the one at bar for the application of that principle can hardly be supposed.

In his petition (p. 4) petitioner asserts that the case should

have been remanded to the District Court for "a finding upon whether or not the well was capable of producing 3000 barrels per day upon open flow. Upon such a trial petitioner and respondents will both have an opportunity to introduce evidence upon the *new issue not heretofore tried in court.*" (Italics added.) The so-called "new issue" has been the only point in dispute since the inception of this controversy. The Bernard No. 3 well was completed as a producer on April 21, 1935 (R. 110). Three days later respondents notified petitioner that in their opinion, which was shared by several experienced oil men with whom the matter had been discussed, the well was capable of producing much in excess of 3000 barrels per day (R. 144, 145). On April 29, 1935, Buck made his first test and reported that the well was capable of producing in excess of 6000 barrels per day *on open flow* (R. 149-150, 204-208). On May 3, 1935, as provided in the addendum clause of the contract, Judge C. E. Hardin designated W. L. Massey to act as umpire, instructing him to determine, first, the actual production through a $\frac{3}{8}$ -inch choke, and secondly, "by using the three-eighths ($\frac{3}{8}$) choke you are to calculate *the open flow capacity of the well.*" (Italics added.) Massey's tests and report (R. 208-214) were made pursuant to that appointment. Since Buck and Massey acted as arbitrators under the express terms of the contract, their reports, if fairly and competently made, were binding on the parties. The Circuit Court of Appeals so found and so held. Hence, no purpose would be served in remanding the case for trial of issues of fact already set at rest by the findings and conclusions of the arbitrators.

Petitioner complains that he was misled by rulings of the Trial Court excluding testimony regarding tests of the Bernard No. 3 well on chokes of sizes other than $\frac{3}{8}$ -inch. In his brief (p. 5) he says:

"Subsequently and repeatedly throughout the trial the District Judge ruled that the only issue in the case was the capacity of this well calculated on a $\frac{3}{8}$ -inch choke."

After quoting the objections and rulings thereon (pp. 5-6) he concludes (pp. 6-7):

"Based on these rulings of the trial judge the case was tried, submitted and decided upon the theory that the amount of the purchase price should be determined by the capacity of the well 'calculated upon a $\frac{3}{8}$ -inch choke.'"

He then complains (p. 7) that because of such rulings he offered no evidence touching upon any other *method of calculation*; and he asserts that the judgment of the Circuit Court of Appeals is based upon its conclusion that the amount of oil the well is capable of producing in a day should be determined by tests made upon a *series of chokes*. That petitioner's complaint is without merit is affirmatively disclosed by the record.

The Circuit Court of Appeals correctly held that under paragraph 3 of the contract the determinative fact is whether the Bernard No. 3 well was capable of producing in excess of 3000 barrels of oil per day on open flow. That court did not hold, as petitioner asserts, that such amounts should be determined by tests made upon a *series of chokes*. The amount of oil the well could produce in a day through any particular choke is not in issue. That fact is material only insofar as it aids in determining the ultimate fact of whether the well was capable of producing in excess of 3000 barrels of oil per day on open flow. There is no magic in the provision of the contract that the capacity of the well should be "calculated on a $\frac{3}{8}$ -inch choke." That provision merely prevented the well from being flowed, during the test period, through an

orifice of such size as might result in irreparable injury to the well.

The undisputed evidence establishes that the productive capacity of an oil well is never gauged by permitting the well to produce on open flow (R. 106). Oil wells in the Gulf Coast area are not produced on open flow (R. 116-117). In order to produce oil with maximum efficiency and conserve the gas pressure which prolongs the life of a well, every flowing oil well produces through a small orifice, called a "choke," attached to the top of the tubing from which the fluid flows. Because of underground conditions which vary in every oil field, the choke used may be $\frac{1}{8}$ -inch, $\frac{1}{4}$ -inch, $\frac{3}{8}$ -inch, $\frac{1}{2}$ -inch, $\frac{5}{8}$ -inch or any other size. To ascertain the open-flow capacity of any well two steps are necessary: (1) the well must be permitted to flow for periods of several hours *through a particular choke* in order to obtain a record of actual production; and (2) short tests must be made on other chokes to ascertain variations in pressure and velocity of fluid "to determine the correct physical condition of the well" on the choke by which the record of actual production is made. The short tests made by Buck and Massey on other chokes, were for the sole purpose of determining "the correct physical condition of the well on a $\frac{3}{8}$ -inch choke" (R. 209). The procedure is detailed by them in their reports (R. 204-214). The graphs attached to their joint report (R. 213-214) show the interrelation between velocity of fluid, size of choke and the amount of oil actually produced; and the formula used by them in calculating the capacity of the well on unrestricted, unchoked or open flow simply derives the quantity of fluid per hour from those factors (R. 211). Once a ratio in velocity of fluid is established between chokes of various sizes, it becomes obvious as a mathematical fact that the formula would correctly calculate, from actual production through a $\frac{3}{8}$ -inch choke, the capacity of the well on open

flow or through an orifice of any size. When the parties agreed that the capacity of the Bernard No. 3 well should be "calculated on a $\frac{3}{8}$ -inch choke," it is obvious that their single purpose was to guard against the danger of irreparable injury to the well in permitting it to flow for long periods of time through a large orifice. The fact to be ascertained—the amount of oil the well was capable of producing on open flow—was the dominant consideration, not the means of its ascertainment. The method, that is, "calculated on a $\frac{3}{8}$ -inch choke," was specified for the sole purpose of preventing injury to the well while the tests were being made.

As heretofore shown, the reports of Buck and Massey, by which petitioner is bound, conclusively establish that the well *was* capable of producing much in excess of 3000 barrels per day on open flow. It is respectfully submitted, therefore, that no substantial reason for a new trial on that issue has been advanced by petitioner.

Point B

Although the effect of the order granting certiorari in this case is to limit the argument to the single question whether a new trial should not have been granted, this Honorable Court has declared that it is not restrained thereby from considering any question presented by the record. *OLMSTEAD V. UNITED STATES*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944; *JUDICIAL CODE*, Sec. 240 (a) [28 U.S.C.A. Sec. 347 (a)].

It has frequently been held that on writ of certiorari to review a judgment of a circuit court of appeals, the entire record is before this Honorable Court, with power to review the action of the circuit court of appeals and direct such disposition as that court might have made upon the appeal from the district court. *LANGNES V. GREEN*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; *STORY PARCHMENT CO. V. PAT-*

PERSON PARCHMENT PAPER CO., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; DELK v. ST. LOUIS & S. F. R. CO., 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590; LUTCHER & M. LUMBER CO. v. KNIGHT, 217 U.S. 257, 30 S.Ct. 505, 54 L.Ed. 757; PANAMA RY. CO. v. NAPIER SHIPPING CO., 166 U.S. 280, 17 S.Ct. 572, 41 L.Ed. 1004. And the failure of respondents to apply for certiorari does not preclude this Honorable Court from considering whether the decree of a circuit court of appeals may be supported on a ground rejected or not decided by that court. LANGNES v. GREEN, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520; PUBLIC SERVICE COMMISSION v. HAVEMEYER, 296 U.S. 506, 56 S.Ct. 360, 80 L.Ed. 357; TEXARKANA v. ARKANSAS-LOUISIANA GAS CO., — U.S. —, — S. Ct. —, 83 L. Ed. (Adv. Op. No. 9, p. 435); STORY PARCHMENT CO. v. PATERSON PARCHMENT PAPER CO., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; COLE v. RALPH, 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567.

Respondents earnestly submit that the decree of the Circuit Court of Appeals in the case at bar can be sustained on an independent ground of recovery which was presented to but not decided by that court and which appears as a matter of law from undisputed evidence in the record. If on that ground respondents are entitled to recover judgment as rendered by the Circuit Court of Appeals, the alleged errors complained of by petitioner, for review of which certiorari was granted, are immaterial and harmless, and constitute no substantial basis for granting a new trial.

On May 6, 1935, respondents made formal demand upon petitioner to comply with the option contract on the basis of a purchase price of \$400,000 (R. 155-157). By letter dated May 7, 1935, petitioner informed respondents that he unconditionally exercised the option given to him under the contract of February 6, 1935, to purchase the lease "for the applicable purchase price as fixed and determined by said con-

tract" (R. 197-198). The controversy between the parties over the purchase price is recognized in that letter (R. 197), and petitioner stated that notwithstanding the controversy he would pay \$200,000 in cash "with full reservation, however, of any and all rights which I have or may have under and by virtue of said agreement" (R. 197-198). Without acquiescing in petitioner's claimed reservation of rights, respondents prepared an assignment of the lease, *reciting a consideration of \$200,000 in cash and an oil payment of \$200,000 payable out of one fourth of seven eighths of the oil produced from the lease*, and deposited the assignment and drafts for the total cash consideration in the National Bank of Commerce of New Orleans, within the time and in the manner provided in the option contract (R. 136-139, 166-167). Petitioner *paid the drafts and accepted the assignment* on May 14, 1935 (R. 166-167), and *the assignment was filed for record in Iberia Parish* on May 15, 1935 (R. 139). Although petitioner filed suit against respondents as soon as he paid the drafts, seeking recovery for the claimed overpayment, and the full amount which he paid to the bank was immediately attached (R. 2-40), all except \$50,000 of the amount was voluntarily released by petitioner (R. 40-43); and after respondents had the case removed to the United States District Court petitioner *voluntarily dismissed his suit against them* (R. 74). By his answer to respondents' cross-bill, upon which the suit was tried below, petitioner claimed title to the lease solely by virtue of said assignment (R. 76-85). *Petitioner never at any time sought reformation of the assignment but has always asserted and still asserts title thereunder*. He wants to keep the lease without paying the consideration provided in the very instrument by which he acquired his title.

Such an inequitable result is prohibited by the universal principle that one who elects to accept the benefits accruing from a contract or deed is bound by the burdens flowing

therefrom. In *DOTY v. BERNARD*, 92 Tex. 104, 47 S.W. 712, the court approved the following statement of the doctrine:

"The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all of its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever."

In 21 C. J. 1208-1209, the principle is thus declared:

"A party to a transaction cannot ordinarily affirm it in part and in part disaffirm it. Thus with regard to rights claimed under a contract, deed, or mortgage, a party will not be allowed to assume the inconsistent position of affirming the contract in part and disaffirming it in part. Courts of equity proceed upon the theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it."

The decisions in Louisiana are in accord: *SHERER-GILLETT CO. v. BENNETT*, 153 La. 304, 95 So. 777; *LEWY v. WILKINSON*, 135 La. 105, 64 So. 1003; *SAVAGE v. WYATT LUMBER CO.*, 134 La. 627, 64 So. 491; *BUCKNER v. BEARD*, 32 La. Ann. 226; *SMITH v. ELLIOTT*, 9 Rob. 3; *CHANDLER & CHANDLER v. CITY OF SHREVEPORT* (La. App.) 162 So. 437.

When petitioner voluntarily dismissed his suit, the garnishment action ancillary thereto necessarily fell also (28 C.J. 272; 6 C.J. 284; 7 C.J.S. 444), and the \$50,000 held by the bank was payable at once to respondents. Petitioner thereafter paid to respondents only \$100,000 of the oil payment (R. 124), although the evidence is undisputed that from April 21, 1935, when the Bernard No. 3 well was completed as a producer to February 26, 1937, when the case was tried in the District Court, there had been produced from the lease 2,000,000 barrels of oil, or more, which petitioner has sold for prices ranging from \$0.90 to \$1.04 per barrel—much more than enough oil to pay the remainder of the oil payment (R. 95-96, 109-110, 163-164). *Under the very terms of the assignment by which he holds and claims title to the lease, therefore, petitioner is liable to respondents for \$100,000, which is admitted to be the balance of the oil payment now due and unpaid.*

Any other conclusion would condone the perpetration of a legal fraud. At the time petitioner paid the drafts and accepted the assignment his sole remedy under the option contract was to refuse to pay the drafts, refuse to accept the assignment as drawn, tender the amount of the purchase price which he claimed to be due, and then file suit for specific performance of the contract. Petitioner would not have been entitled to title and possession of the lease until he prevailed in a suit for specific performance, which, respondents confidently assert, he never could have done. Instead of pursuing that remedy he elected to pay the drafts, accept the assignment and take possession of the lease at once. In so doing he became conclusively bound by the terms of the assignment.

If petitioner did not intend to pay the consideration when he accepted the assignment which expressly obligated him to do so, a salutary principle of equity brands this act as fraud, and respondents would be entitled to rescission and cancellation of the assignment. CHICAGO, T. & M. C. RY. CO. v.

TITJERINGTON, 84 Tex. 223, 19 S.W. 472, 31 Am. St. Rep. 39; CEARLEY V. MAY, 106 Tex. 444, 167 S.W. 725; EDWARD THOMPSON CO. V. SAWYERS, 111 Tex. 374, 234 S.W. 873; WYATT V. CHAMBERS (Tex. Civ. App.), 182 S.W. 16. In WYATT V. CHAMBERS, *supra*, the court approved the following statement of the rule:

"Where a proposed grantee in order to procure a deed to real estate made promises and representations to the grantor that he would pay her \$700 in cash upon the delivery of the deed, and the grantor relying upon such promises and representations executed and delivered the deed to the grantee, when at the time of making said promises and representations said grantee made the same for the purpose of defrauding and deceiving the grantor, and had the intention at the time of not paying the promised cash payment, and never did pay the same, the grantee was guilty of such fraud as will authorize the cancellation of the deed."

In Louisiana, by Art. 2561, of the CIVIL CODE, the right to rescission is guaranteed to the seller, *irrespective of fraud*, where the buyer fails to pay the agreed consideration. Art. 2561 provides: "If the buyer does not pay the price the seller may sue for dissolution of the sale." GONSOULIN V. ADAMS, 28 La. Ann. 598; CHANDLER V. BURKHALTER, 10 L. App. 575, 121 So. 353 (where, as here, the consideration recited in the conveyance was never paid). And the seller may have rescission even after recovery of a judgment against the purchaser for the purchase price, if he is unable to collect his judgment. CANAL BANK V. COPELAND, 15 La. 75.

By his acts petitioner has acquiesced in respondents' understanding and interpretation of the contract and holds title to the lease under an assignment obligating him to pay a consideration of \$400,000 therefor. He has never at any time or

in any court sought reformation of the assignment. Therefore his liability to pay the consideration is fixed, and respondents are entitled to judgment against him for \$100,000.

" WHEREFORE, respondents pray that the writ of certiorari heretofore granted in this cause be dismissed as improvidently granted; in the alternative, respondents pray that the decree of the Circuit Court of Appeals be affirmed.

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Dated November 1, 1939.

